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In the Supreme Court of the United States

Kentucky Retirement Systems, Commonwealth of Kentucky, and Jefferson County Sheriff's Department.
Petitioners,

v

Equal Employment Opportunity Commission.
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATES OF MICHIGAN, ALASKA, ARKANSAS, COLORADO, DELAWARE, IDAHO, MARYLAND, MINNESOTA, NEW MEXICO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE AND TEXAS AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The State of Kentucky's public employee retirement statutes include normal and disability retirement benefits. Under Kentucky's retirement plan a member is eligible for normal retirement benefits after 20 years of service or at age 55 with five years of service. A disability retirement is designed to replace a normal retirement if the member becomes disabled and can no longer work and is not yet eligible for a normal retirement. However, a member who is eligible for a normal retirement may not receive a disability retirement. In calculating Kentucky's disability retirement benefit, it is assumed that the member would have worked for 20 years, or to the normal retirement age of 55, whichever occurs first. Up to 10 years of imputed service credit can be added to the actual years of service. The disability retirement benefit is calculated using actual years of service plus any imputed service credit so that the amount of the disability retirement is approximately equal to the amount the employee would have received upon normal retirement.

The question presented is:

Whether any use of age as a factor in a disability retirement plan is "arbitrary" and thus renders the plan facially discriminatory under a disparate treatment theory of recovery in violation of the Age Discrimination in Employment Act.

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INTEREST OF THE AMICUS CURIAE

Under Kentucky's retirement plan a member is eligible for normal retirement benefits after 20 years of service or at age 55 with five years of service. A disability retirement is designed to replace a normal retirement if the member becomes disabled and can no longer work and is not yet eligible for a normal retirement. However, a member who is eligible for a normal retirement may not receive a disability retirement. In calculating Kentucky's disability retirement benefit, it is assumed that the member would have worked for 20 years or to the normal retirement age of 55, whichever occurs first. Up to 10 years of imputed service credit can be added to the actual years of service. The disability retirement benefit is calculated using actual years of service plus any imputed service credit so that the amount of the disability retirement is approximately equal to the amount the employee would have received upon normal retirement.

Michigan and the undersigned States are concerned that the decision of the Court of Appeals,[1] which found that Kentucky's plan[2] was discriminatory, will adversely impact their ability to apply their existing retirement statutes that best meet their respective needs and the needs of their employees. Consequently, they file this amicus brief asking this Court to reverse the Court of Appeals.

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[1] *Equal Employment Opportunity Commission v Jefferson County Sheriff's Department, Kentucky Retirement Systems and the Commonwealth of Kentucky*, 467 F 3d 571 (CA6 2006).

[2] *KRS* 16.505 et seq., *KRS* 61.510 et seq., and *KRS* 78.510 et seq.

STATEMENT

The Equal Employment Opportunity Commission (EEOC) brought this action against Kentucky Retirement Systems, the Jefferson County Sheriff's Department and the Commonwealth of Kentucky (Petitioners) alleging that the eligibility requirements and the manner in which disability benefits are calculated under Kentucky's statutes violate the Age Discrimination in Employment Act (ADEA).[3] The EEOC asserted that the Kentucky statutes were facially discriminatory because age was considered a factor in determining benefits. The Court of Appeals, sitting en banc, held that Kentucky's retirement plan was facially discriminatory because it excluded those employees who were over 55 years of age from receiving a disability retirement because they were eligible for a normal retirement.[4] In addition, the Court found that Kentucky's statutes were facially discriminatory because employees younger than 55 receive disability retirement benefits that are less than even younger employees simply because of their age.[5] The Court of Appeals reached these conclusions without determining whether Kentucky's retirement plan was arbitrary.

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[3] Age Discrimination in Employment Act (ADEA), 29 USC 621 *et seq.*

[4] *Equal Employment Opportunity Commission*, 467 F 3d at 579.

[5] *Equal Employment Opportunity Commission*, 467 F 3d at 579-580.

SUMMARY OF ARGUMENT

The Court of Appeals erred when it concluded that Kentucky's statutes violated the ADEA. The ADEA was enacted by Congress to prohibit employers from terminating older workers for no reason except their age and from refusing to hire older workers simply because of their age. Kentucky's retirement statutes do neither of these. Instead, they seek to ensure that all public employees in Kentucky, regardless of their age, are provided a benefit when they are no longer able to work. Because Kentucky's retirement statutes use other reasonable factors besides the age of the employee to determine the benefit to be given to disabled employees, the Kentucky statutes do not violate the ADEA.

ARGUMENT

I. The Kentucky retirement plan does not violate the Age Discrimination in Employment Act.

In 1964, Congress requested the Secretary of Labor Willard Wirtz to complete a study of the factors that might tend to result in discrimination in employment because of age and to recommend legislation to "prevent arbitrary discrimination in employment because of age." (Wirtz Report)[6] The report from Secretary Wirtz noted that arbitrary discrimination results from certain age limits.[7] Moreover, the report observed that "institutional arrangements . . . indirectly restrict the employment of older workers."[8] In addition, the report defined arbitrary age discrimination as "assumptions about the effect of age on [an employee's] ability to do a job when there is in fact no basis for these assumptions."[9]

After the report was received, Congress held extensive hearings.[10] The testimony at the hearings "dwelled on unjustified assumptions upon the effect of age on the ability to work."[11] The comments of Representatives and Senators centered on the

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[6] 78 Stat 265 § 715; Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment, 5-6 (June 1965) reprinted in U.S. Equal Employment Opportunity Commission, Legislative History of the Age Discrimination in Employment Act 22-23 (1981) (Wirtz Report).

[7] Wirtz Report, p 2.

[8] Wirtz Report, p 15.

[9] Wirtz Report, p 2.

[10] *General Dynamics Land Systems, Inc. v Cline, et al*, 540 US 581, 587-588 (2004).

[11] *General Dynamics*, 540 US at 588.

prevention of discrimination against older workers who wanted to work.[12]

This Court has held that the ADEA was enacted as a result of the Wirtz Report.[13] When the ADEA was enacted, Congress set forth its findings and its purpose for passing the statute. The findings stressed that older workers were at a disadvantage in retaining a job and in regaining employment due to arbitrary age limits that restricted a person's right to work.[14] As a result, Congress stated that the purpose of the ADEA was to[15]:

> promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment. [Emphasis added]

As this Court has stated[16]:

> Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.

This Court has also stated that "arbitrary age discrimination" refers to the Wirtz Report's finding that employers have age limitations on new hires i.e., those over age 45, without consideration of the applicants'

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[12] *General Dynamics*, 540 US at 588-589.
[13] *Smith v City of Jackson*, 544 US 228, 232-233 (2005).
[14] *General Dynamics*, 540 US at 589.
[15] 29 USC 621(b). (Emphasis added).
[16] *Hazen Paper Company v Biggins*, 507 US 604; 610 (1993).

other qualifications.[17] As a result, this Court has held that[18]:

> The ADEA's ban on "arbitrary limits" thus applies to age cases that exclude older applicants, necessarily to the advantage of younger ones."

The Kentucky retirement statutes do not violate the ADEA because they are neither contrary to the purpose of the ADEA nor do they arbitrarily discriminate against a public employee covered by the retirement plan based upon the employee's ability to do a job. Moreover, the Kentucky plan is not arbitrary because it does not place an age limit on when someone can be hired or when someone must be terminated. Instead, the retirement plan provides a benefit to employees when they can no longer perform their jobs, regardless of age. In other words, any employee who can no longer work receives either a disability retirement or a normal retirement, both of which are calculated in the same manner, except it is assumed that the disabled member would have continued working until normal retirement age.

The Court of Appeals viewed the EEOC's claim as one of disparate treatment discrimination. Under a disparate treatment theory, the employer "simply treats some people less favorably than others because of" their age.[19] However, in *Hazen Paper v Biggins*, this Court held that "there is no disparate treatment under the

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[17] *General Dynamics*, 540 US at 590.

[18] *General Dynamics*, 540 US at 590. See also *Smith*, 544 US at 255, O'Connor, Jr., concurring (concluding that the Wirtz Report's definition of "arbitrary" "clearly equates with disparate treatment" that is "intentional and unfounded").

[19] *Hazen Paper Company*, 507 US at 609.

ADEA when the factor motivating the employer is some feature other than the employee's age."[20] The employee's age is not the motivating factor in Kentucky's retirement plan.

The factor motivating Kentucky in its retirement plan is to provide a similar level of protection to all members regardless of age. Indeed, the effect of Kentucky's retirement plan and its ability to ensure a benefit to all covered employees is age neutrality. Kentucky reaches this goal by providing retirement protection to an employee who either retires after attaining sufficient service and age benchmarks or who cannot work due to disability. If the employee already qualifies for a normal retirement due to age and years of service, then the goal of providing retirement protection is achieved and there is no reason to have that person apply for a disability retirement.

The facts establish that Mr. Lickteig became disabled when he was 61years old after 17 years of service. He was not given service disability credit of 20 years because he was already eligible for a normal retirement benefit after 17 years of service. As noted, the overriding purpose of Kentucky's retirement plan is to ensure that a benefit is provided to employees who either become disabled and can no longer work or who have worked long enough to become eligible for a benefit under a normal retirement. Here, that purpose was met since Mr. Lickteig was eligible for a normal retirement.

The Court of Appeals held that the Kentucky plan discriminated against Mr. Lickteig because he was not eligible for a disability retirement since he was over 55

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[20] *Hazen Paper Company*, 507 US at 609.

years old.[21] But, Mr. Lickteig was eligible for a normal retirement, a fact that the Court of Appeals failed to properly consider. Moreover, someone like Mr. Lickteig, who was 61 years old when he became disabled, was not similarly situated to a 40-year-old who becomes disabled, assuming they each had 17 years of service. The 40-year-old could have worked more years than Mr. Lickteig. Thus, a disability benefits system giving a 40-year-old three more years of service credit to reach 20 was not arbitrary because the benefit entitlement was related to, but not determined by age.[22]

The critical factor in Kentucky's statutes is how many years a person has worked before becoming disabled, not the age at the time of disability. Indeed, there are situations under Kentucky's plan when an older disabled employee would receive more service credit than a younger employee. For example, if one employee is 40 years old with 10 years of service and the other is 38 years old with 15 years of service, the 40-year-old will be credited with 10 years of service while the 38-year-old will be credited with only 5 years of service. Moreover, the age of the employee may not even be relevant. For example, every employee with 20 years of service who becomes disabled receives a normal retirement allowance regardless of age. Thus, in Kentucky's plan, age is *not* the motivating factor and therefore the plan does not violate the ADEA.

This Court has held in a disparate treatment case that "proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact

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[21] *Equal Employment Opportunity Commission*, 467 F 3d at 579.
[22] *Lyon v Ohio Education Ass'n a Professional Staff Union*, 53 F 3d 135, 137, 140-141 (6th Cir 1995).

of differences in treatment."[23] But here there is no proof of discriminatory motive in Kentucky's retirement statutes. The retirement plan simply provides that a person who has earned a normal retirement is not eligible to receive a disability retirement. That determination is based on years of service, not age. As this Court held in *Hazen*, "an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service."[24]

This Court's decision in *Smith v City of Jackson* is instructive.[25] In *Smith* the city gave a higher percentage pay raise to police officers with less than 5 years of service than to other police officers. Most police officers with more than 5 years of service were older. These officers sued, claiming that they were discriminated against because of their age. This Court held that the ADEA does not prohibit action where the differentiation in treatment was based on reasonable factors other than age discrimination.[26] The Court found that the difference in the percentage of pay increase was reasonably related to the City's "perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market."[27] As a result, this Court affirmed the dismissal of the plaintiff's complaint.

Likewise, Kentucky's disability retirement statutes are based on permissible factors. They are intended to

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[23] *Teamsters v United States*, 431 US 324, 335, n15 (1977) quoted with approval in *Hazen Paper Company*, 507 US at 609.

[24] *Hazen Paper Company*, 507 US at 613.

[25] *Smith v City of Jackson*, 544 US 228 (2005). *Smith* was a disparate impact case, but the same analysis applies in the present disparate treatment context.

[26] *Smith*, 544 US at 238, 241.

[27] *Smith*, 544 US at 242.

ensure a benefit to employees who have not worked long enough to be eligible to receive a normal retirement but who can no longer work due to injury. They are not intended to discriminate against older workers. Instead their purpose is to guarantee that a covered employee will receive some benefit if the employee cannot work, regardless of his or her age. Kentucky's plan has no connection with the kind of discrimination Congress intended to prohibit in the ADEA—discrimination against older workers who are seeking a job or who wish to retain their job. Instead, Kentucky's retirement plan is an attempt to assist employees who can no longer perform their job due to a disability. This Court should reverse the decision of the Court of Appeals.

II. The Court of Appeals decision could have substantial adverse consequences in other States.

The Court of Appeals' decision could have substantial adverse implications for the retirement systems of many States that have retirement statutes. This is because the Court of Appeals has held that a retirement statute that merely uses age as one of the factors to determine the eligibility and amount of a particular benefit is subject to challenge on the basis that it is discriminatory. The Court of Appeals decision sweeps aside the reasoned decision of the Kentucky Legislature whose retirement statutes, like the retirement plans enacted by other States for their respective public employees, were enacted to meet the particular needs of their governmental employees and the State.

What the Court of Appeals failed to recognize is that *all* retirement benefits are not equal among *all* employees. In Kentucky, as in most States, the more

years that a person works and the higher a person's salary, the larger the person's pension will be. A 60-year-old could have worked for 30 years at a secretarial position and not receive as much in retirement as a 55-year-old department director with only 10 years of service. This does not mean that the statute discriminates against the 60-year old employee. It only means that other factors such as years of service and pay rate also determine a retirement amount.

In the case of Mr. Lickteig, while he did not receive a "full" disability retirement benefit of 20 years, he nonetheless is eligible to receive a normal retirement benefit due to a combination of his age and his years of service. Mr. Lickteig has not suffered age discrimination with respect to his desire to work or his eligibility to receive a benefit. Rather, the purpose of Kentucky's statutes, which is to ensure that those who become disabled receive a benefit, was fulfilled. Neither that purpose nor Kentucky's method of achieving that purpose in its retirement plan, violates the ADEA, which was intended to prevent employers from arbitrarily terminating older workers or refusing to hire older workers simply due to their age.

Many States, such as Michigan, have a constitutional prohibition against the impairment or diminution of governmental pension allowances.[28] If the Court of Appeals decision is not reversed, these States may be forced to enact major revisions to their retirement statutes. This might be very difficult to do without violating the constitutional prohibition, unless the States

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[28] Const 1963, art 9, § 24; *Seitz v Probate Judges Retirement System*, 189 Mich App 445, 449-451; 474 NW2d 125 (1991) app den 439 Mich 946; 482 NW2d 459 (1992) reconsideration den 483 NW2d 898 (1992).

increase the benefits of those individuals like Mr. Lickteig. This increase could cost millions of dollars nationwide and could further weaken the economic viability of retirement funds that may already be underfunded. Congress never intended the ADEA to have this result.

CONCLUSION

The opinion of the Court of Appeals should be reversed.

Respectfully submitted

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